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Reforming Juvenile Sentencing

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The tragedy of Littleton, Colorado, where two high school students killed a number of their classmates and a teacher, before killing themselves, is the most deadly of a string of recent school shootings. Unlike any similar event, it has sparked a national dialogue on violent youth crime. How can it be prevented? Who is responsible for youth crime — families, schools, the entertainment industry, the juvenile justice system? Once juveniles commit criminal offenses, what should society do to rehabilitate and reintegrate them while protecting the lives and property of those around them?

Congress is currently considering a juvenile justice bill, introduced by Senator Orrin Hatch, that promises states funding in exchange for enacting harsher juvenile sentencing laws, requires the creation of a national database for juvenile offenders, and mandates the U.S. Sentencing Commission to develop juvenile sentencing guidelines. The national focus on juvenile crime caused FSR to turn its attention to juvenile sentencing. This Issue showcases a number of approaches — state and international — to the sentencing of juveniles. It also presents several thought-provoking pieces on how to structure juvenile guidelines, should they become part of the new Commission's agenda.

I. Public Perception

In Western societies, criminal offenders have become the pariahs of the late twentieth century — a view reflected in the "tough on crime and criminals" formula popularized in North America and Western Europe. This holds true even for children and teenagers who commit crimes, especially violent crimes. As Julian Roberts documents, in the United States and Canada the public generally overestimates the number of juvenile offenses, underestimates the severity of the penalties and tends to consider rehabilitation, even for juveniles, to be ineffective.

The juvenile crime rate in North America and the European Union rose dramatically from the mid-1980's to the early 1990's. Of special concern was the increase in violent crime, and in the United States in particular in homicides committed by juveniles. Josine Junger-Tas does an admirable task in outlining some reasons for the rise in juvenile crime, most of which are connected to changes in the labor market or the "behavior requirements of post-industrial society."

The media portrayal of violent juvenile crime and especially of horrendous but rare violent offenses by children has contributed to the perception of a violent crime wave even though it has been declining since the mid-1990s. Between 1994 and 1997 the juvenile arrest rate for violent crime in the United States decreased by 23%; in about the same time-frame, the juvenile arrest rate for murder dropped by over 40%. As of 1997, the arrest rate for robberies had fallen to its lowest level since 1975.[1] In Canada, as Julian Roberts shows, a similar decline has occurred. Franklin Zimring notes that even a falling juvenile crime rate does not provide much comfort. The media and some legislators are already focusing on a projected future rise in juvenile crime. This projection, which instills fear in the population, is based on the assumption that an increase in the absolute number of juveniles will inevitably lead to a rise in juvenile crime — a connection not borne out in the last quarter century.

The public's belief that juvenile offenders are being treated too leniently has caused numerous state legislatures to toughen juvenile sentencing. Emphasizing the accountability of juvenile offenders rather than their youth, many states have lowered the age at which juveniles can be tried as adults and increased the list of offenses for which juveniles can be trans-

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ferred to adult courts. As David Yellen notes, some states have extended mandatory minimum statutes to juveniles; others count certain juvenile convictions for purposes of their three-strikes laws. The same move toward more punitive juvenile sentences has been detected abroad. Andrew Rutherford notes the English Labor Party's implementation of more punitive criminal sanctions for juvenile offenders as young as ten. However, Josine Junger-Tas indicates that some countries have retained greater protection for juvenile offenders, or at least some groups of juvenile offenders. The Netherlands, for example, do not certify juveniles to adult courts.

II. The Goals of Juvenile Sentencing

A. Rehabilitation, Accountability and Public Safety

While the original juvenile court system centered around the rehabilitation of youth whom society viewed as errant but not necessarily criminal, that emphasis shifted within a few years. Since the early twentieth century, the juvenile justice system has combined retributive, incapacitative and rehabilitative goals. However, as rehabilitation fell into disfavor in adult sentencing during the 1970s and 1980s, a similar fate befell it in juvenile sentencing. As David Yellen indicates, states adapted the purpose section in their juvenile sentencing codes accordingly, and added "punishment and community protection" as explicit sentencing goals. As early as the late 1970s, Washington State, the only jurisdiction in the United States that has adopted juvenile guidelines so far, focused explicitly on the accountability and rehabilitation of juvenile offenders.

The United States is not unique in this respect. Julian Roberts and Anthony Doob and Jane Sprott, discussing the recently proposed Canadian Youth Criminal Justice Act (YCJA) in two separate articles, note changes in the purpose section of the Canadian system. Prior to 1984 it concentrated almost exclusively on rehabilitation, but subsequent changes introduced the notions of accountability and responsibility. The most recent proposal expresses both goals in the overarching purpose statement of the YCJA.

B. Limiting Custodial Sentences

Despite similar language, however, the changes to the Canadian purpose section have been driven not by a desire for increased punitiveness but by concerns about the high incarceration rate of juveniles, high even compared to the United States. The rate in Canada is yet more surprising because its juvenile crime is lower and less violent than in the United States. The new Act is designed to lower the incarceration rate by prescribing use of the "least restrictive sentence" that allows for the fulfillment of the sentencing goals, rehabilitates the defendant and instills a sense of responsibility in him or her. In addition, the Act allows judges to reuse previously imposed alternatives so that a repeat offender will not be automatically subject to imprisonment. While Doob and Sprott are optimistic that the new legislation may be able to change the Canadian preference for incarceration, Roberts is less sanguine. The experience in Britain may serve as a warning. The British juvenile justice act of 1991 focused on the avoidance of custodial sanctions even though it was firmly grounded in a just deserts philosophy. Nevertheless, the juvenile prison population rose dramatically in the wake of a highly publicized killing committed by two juveniles.

As Roxanne Lieb and Megan Brown explain, unbounded departures based on "manifest injustice" grounds led to substantial disparities.

C. Avoiding Unwarranted Disparities

When Washington State studied its juvenile courts in the late 1970s, it discovered that similarly situated offenders were often treated in a very dissimilar manner. However, the juvenile guidelines drawn up in partial response to the disparities did not improve the system much. As Roxanne Lieb and Megan Brown explain, unbounded departures based on "manifest injustice" grounds led to substantial disparities. Only with restraints on judicial discretion which circumscribed the use of these departures did disparity decrease. Nevertheless, race-based differences continue to exist. While those differences can be partially explained by variations in the offenders' background, it is unclear whether systemic racism accounts for some of the sentence differentials.

Despite calls for reform, Lieb and Brown indicate that Washington's guidelines have not been changed much in recent years. An increase in judicial discretion, it is feared, may lead to

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racial disparities greater than the existing ones and become too expensive as judges opt more frequently for custodial sentences. Roberts and Doob and Sprott indicate that in Canada regional disparities are striking. However, in contrast to Washington State, the Canadian public seems less concerned about disparity.

David Yellen fears that the creation of federal juvenile guidelines that build on the existing adult system would discriminate heavily against African-Americans. He assumes that a federal juvenile system would replicate the existing sentencing framework with its harsh drug penalties and mandatory minimums. That is one reason why he advocates a juvenile guideline model of "limiting retributivism" that would allow for more discretion than the current federal system and not include mandatory minimum sentencing laws.

Ultimately, the implementation of legislatively mandated goals rests with individual judges. How can their discretion be circumscribed so as to assure a more uniform realization of all envisioned aims, which often include protection of public safety, rehabilitation of the offender, limited use of custodial sentences, and prevention of unwarranted disparities?

III. Juvenile Guidelines as a Model?

Because of their heavy emphasis on rehabilitation, the juvenile systems in most states have allowed judges broad discretion, reminiscent of the pre-guideline system in federal courts.

A. The Location of Discretion

As in the adult system, discretion enters at every stage of the juvenile justice system. Andrew Rutherford explains that in England much of the discretion rests with the police who have been authorized to issue formal cautions that divert juveniles from the judicial process. Even though these warnings carry weight if a juvenile is subsequently prosecuted for a different offense, the percentage of juveniles who were cautioned rather than prosecuted rose more than fifty percent between 1979 and 1992. In addition, English courts have routinely conditionally discharged young offenders.

The Crime and Disorder Act 1998, however, limited police discretion as well as judicial discretion. A proposed juvenile bill would shift much of the juvenile docket on to "youth panels" which would monitor a juvenile's compliance with imposed terms. Andrew Rutherford sees the creation of such "youth panels" and of "youth offending teams," which are to deal with young offenders throughout their encounter with the criminal justice system, as moving towards a more individualized approach.

The English focus seems reminiscent of the New York Youth Part, described by Judge Michael Corriero. The New York system allows judges to follow-up with juvenile offenders and monitor their performance. Though statutorily bounded, this system still grants individual judges substantial discretion.

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In many states, attempts to limit discretion go hand in hand with a focus on the youth's accountability and a more punitive philosophy. If juveniles and adults are equally responsible for their offenses, both can be judged based on a just deserts philosophy which focuses on the offense committed. Judge Corriero and David Yellen both challenge this underlying assumption and advocate a more flexible system since children differ from adults in their mental and emotional capacities. They argue that for juveniles, background characteristics, rather than merely the offense of conviction, should determine whether they constitute a security risk and their chances of reintegration.

B. Criminal History of Juvenile Offenders

Increasingly, states allow courts to factor juvenile records into sentencing decisions. This enables the court to distinguish first-time offenders from recidivists, and to impose sentences that consider both offense conduct and criminal history.[2] Canadian studies show that the existence of a juvenile record substantially increases the likelihood of incarceration for a subsequent juvenile offense.

In the United States, juvenile records are often the cause of sentencing disparity. As Markus Funk points out, states treat juvenile convictions differently, with some expunging them entirely. Therefore, those with juvenile records may be treated differently depending on where such record was incurred. Disparity is not Funk's only concern. As serious youth crime

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is a good predictor of violent adult offenses, he deems juvenile records to have high predictive validity. To remedy disparity and increase specific deterrence, Funk suggests the creation of a national data base for violent juvenile convictions so that federal courts may have access to an offender's entire criminal history. He also proposes that the U.S. Sentencing Commission treat juvenile convictions like adult convictions for purposes of calculating an offender's criminal history category.

C. Custodial Sentences and Alternatives

Although the purposes of juvenile and adult sentencing have converged, juvenile systems have retained a larger panoply of alternative sanctions. Andrew Rutherford cites this as one of the crucial differences between the adult and juvenile systems in England. However, determinate and mandatory minimum sentences applied to youth may serve to undermine this distinction. Jurisdictions may nevertheless advocate the use of alternatives, especially when the decision-makers are able to draw distinctions between minor and serious, violent offenders.

Judges frequently resort to custodial sentences for repeat offenders, even if their crimes are minor. Canadian judges, for example, impose short custodial sentences disproportionately because they feel that no other options are available when sentencing repeat minor property offenders. To remedy this situation, the proposed Canadian legislation lists additional sanctions that were not part of earlier bills.

Much of the concern about alternatives in lieu of incarceration is driven by the cost of imprisonment, as in the Netherlands. There, proposed legislation focuses on supervised release after imprisonment and punitive alternatives served in the community. Innovative alternatives that focus on making the victim whole may also be developed in juvenile sentencing. In the Netherlands, for example, victim restitution is an important part of juvenile sentences.

Judge Corriero describes the New York City Youth Part which processes cases of 13–15 year old juveniles accused of serious and violent crimes and shows how such courts may assist in the rehabilitation of juvenile offenders through intensive community supervision. He views community-based alternatives as "extensions of the court" that allow the judge to distinguish between offenders who should be incarcerated and those who can be reintegrated without custodial sentences. Judge Corriero views rehabilitation as the goal of juvenile sentences since "[v]irtually all children sentenced as 'Juvenile Offenders' in the adult court, with the exception of those convicted of murder, will return to society by the age of 21."

While a comparison of adult and the juvenile sentencing processes may provide new insights into each other, children, juveniles and adults are not fungible.

D. Federal Juvenile Guidelines

Franklin Zimring sees the current discussion about federal guidelines as an attempt to impose a crime control strategy on juvenile crime and deprive offenders of the traditional protection extended by juvenile courts. David Yellen and Roxanne Lieb and Megan Brown, on the other hand, see advantages in a successfully working juvenile guideline system. In describing the Washington system, Lieb and Brown show how juvenile guidelines may insulate the juvenile system from political attempts to make it more rigid and more severe. They also highlight how the positive experience with the juvenile guidelines system in Washington facilitated the subsequent development of adult guidelines. The two systems ultimately strengthened each other's legitimacy.

In light of the Lieb and Brown discussion of Washington's guidelines, the development of federal juvenile sentencing guidelines seems like a project doomed to failure if the congressional goal is to have the Commission create a prototype for state adoption. Many guideline states have rejected the federal guidelines as a model because of their rigidity and excessive detail. States may similarly be reluctant to adopt a federal juvenile model that suffers from comparable shortcomings.

More importantly, the federal system processes a very small number of juveniles every year – 200 to 300 – with a curious mix of offenses and offenders.[3] Many federal juvenile offenders are more violent than the typical juvenile offender; about 50% of cases arise in four judicial districts; and many juvenile offenders in federal court are Native Americans. Therefore, to develop juvenile guidelines that would be attractive to the states, the Commission should look toward the Washington precedent and the innovative work being done in non-

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guideline states and abroad rather than replicate the adult guidelines. Rather than copy the non-rehabilitative approach of the federal guidelines, juvenile guidelines may find it useful to distinguish between punishment-oriented policies for older, repeat violent offenders and a more rehabilitation-oriented model for younger offenders. Finally, since the existing federal guidelines offer only a sparse set of alternative sanctions, federal juvenile guidelines would have to be retooled substantially to allow alternative sentences for some offenders who would not qualify for alternatives were they adults.

An innovative federal juvenile guideline model could reinvigorate many of the debates surrounding the adult guidelines and provide a fresh look at stalled disputes.

IV. Conclusion

While a comparison of adult and the juvenile sentencing processes may provide new insights into each other, children, juveniles and adults are not fungible. In light of salient developmental differences, we should carefully consider whether, for juveniles, the primary focus should not be on the prevention of crime and rehabilitation. Otherwise the United States may find itself in opposition to internationally developed human rights standards of which Andrew Rutherford reminds us. The United Nations Declaration on the Rights of the Child mandates the signatory countries to deal with young people in an age-appropriate manner and to "promot[e] the child's reintegration and the child assuming a constructive role in society."

Notes

[1] During the 1980's the number of girls involved in juvenile offenses overall, and in violent crime, increased more than the (violent) crime arrest rate rose overall. This development parallels the increase in women in adult prisons. During the 1990s the decline in violent crime arrest rates was less for female juveniles than for young men.

[2] *See generally* Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206 (1998).

[3] This number is in contrast to a total of 1.8 million criminal cases processed by juvenile courts in 1996.

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